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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California

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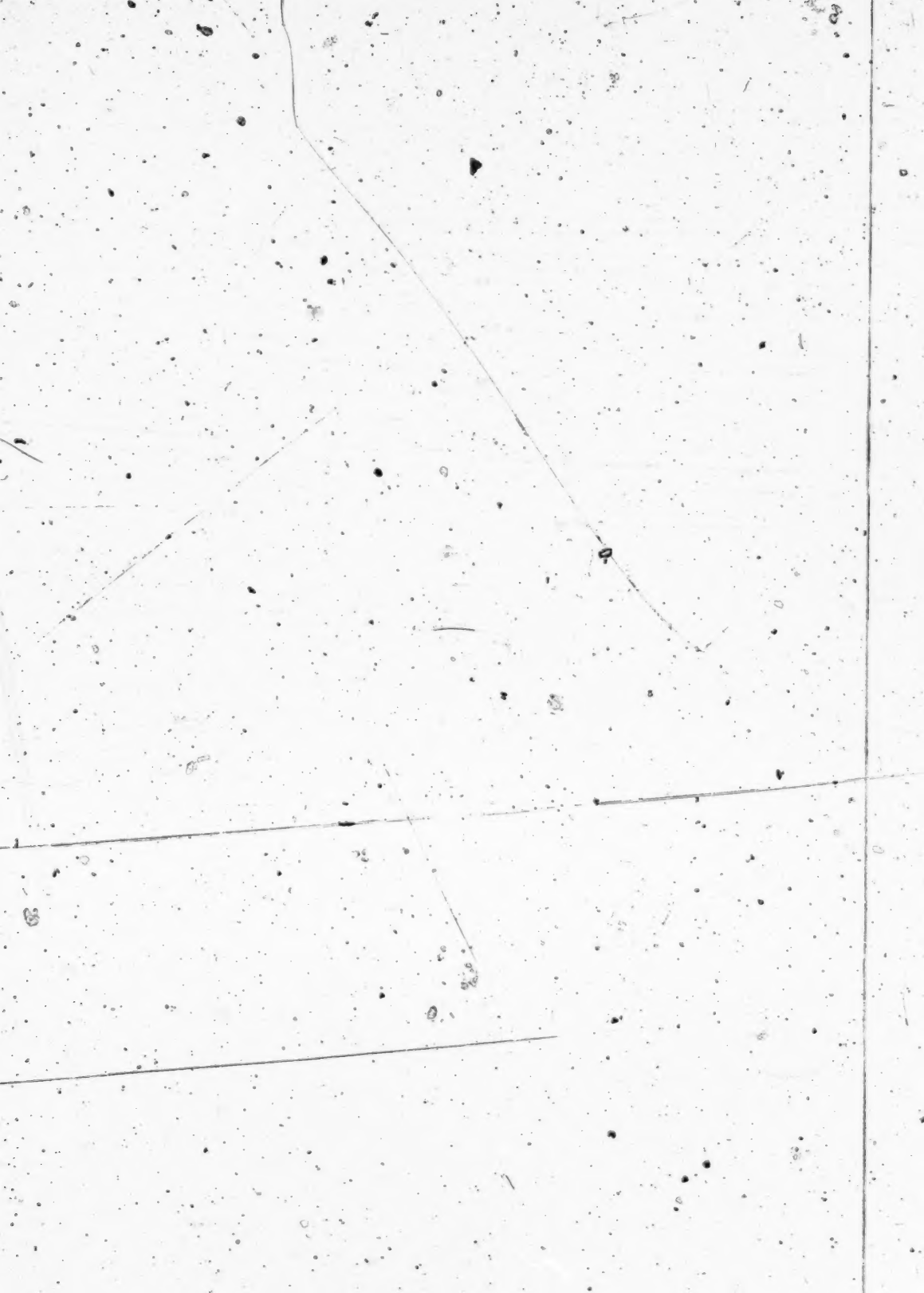

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PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California rendered and entered November 8, 1967.

JURISDICTION

Petitioner filed his petition for writ of habeas corpus September 21, 1967, in the Supreme Court of the State of California, which sets forth facts, not patently false or frivolous, showing that petitioner is

imprisoned for life by a first degree murder conviction, as the result of denial of Fourteenth Amendment due process in his jury trial. The order of the California Supreme Court denying the habeas corpus petition was rendered and entered November 8, 1967. (Appendix A.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257, Subsection 3. (Appendix B.)

QUESTION PRESENTED

The question presented for review is:

Does introduction of a codefendant's confession which inculpates the petitioner, deny petitioner due process right to confront witnesses against him, even though the court instructs the jury not to consider the confession as against the petitioner?

STATUTES INVOLVED

The case involves: The Sixth and Fourteenth Amendments, United States Constitution; Article VI, Section 4, and Article I, Section 5, California Constitution; and Section 1111, California Penal Code; the pertinent provisions of which are set forth in Appendix B.

STATEMENT OF THE CASE

Summary

On June 11, 1959, petitioner Ernest C. Pickens was sentenced to life imprisonment by the Superior Court of the State of California in and for the City and

County of San Francisco, in Action No. 55,765, *People of the State of California v. Ernest C. Pickens and Walter Senior.* (RT 333.)[1] The judgment was affirmed in 1961, *People v. Pickens,* 190 Cal.App.(2d) 138. (Appendix C.)

During the trial, the prosecution introduced, over the objection of petitioner, the accusatory confession of the codefendant Walter Senior, both by tape recording played to the jury, and by a written transcript of the recorded confession read by the jury. (RT 131-174.) The accusatory confession of codefendant Senior is set forth verbatim, RT 132-174. The attorney for petitioner Pickens specifically objected that even if the jury was instructed not to consider it against petitioner Pickens, that nevertheless the statement was hearsay and prejudicial to petitioner:

> "Mr. Giubbini (for the State): First of all, the statement is a statement from the defendant Walter Senior, and would not be admissible against the defendant Pickens, who is a client of Mr. Woodman's, so that I'm not certain that he has a right to make the objection at this time.
>
> Mr. Woodman (for Pickens): Oh, yes, I do, your Honor." (RT 126.)

> "Mr. Woodman: . . . it's an extrajudicial statement, purely hearsay . . . this is strictly a self-serving declaration on the part of Mr.——
>
> The Court: I know, but it doesn't apply to your client——
>
> . . . Mr. Woodman: —it's an act—I'll put it this way: basically, it's an accusation that two

[1] "RT" means reporter's transcript of testimony.

(a) Violated the right of petitioner to confront the witnesses against him, contrary to the due process clause, Fourteenth Amendment, United States Constitution. . . ."

(Page 8, Petition for Writ of Habeas Corpus.)

Detailed Trial Situation

The opinion in *People v. Pickens,* 190 Cal.App.(2d) 138, 141-144 (Appendix C), discloses the following:

The body of Charles Ackley was found on March 2, 1959, at 8 a.m., in a grove of trees near Sharp Park Golf Course. The autopsy disclosed that death occurred an estimated 30-48 hours earlier, from a brutal beating. An accomplice Mary Maribo was the chief witness against petitioner. She testified that at 5 p.m. of February 26, 1959, she was at petitioner's house on Lee Street, San Francisco, and there saw petitioner and codefendant Walter Senior bring in the victim and thereafter beat and kick him to unconsciousness. She herself and petitioner's wife Wanda also joined in the kicking. She and Walter Senior left at 9 p.m. The evening of the next day February 27, 1959, Senior told her the victim was alive in the basement of the Pickens house; and on February 28, 1959, Senior told her Ackley had left.

(In California, Section 1111, California Penal Code, specifically prohibits a conviction based on the testimony of an accomplice, unless there is other evidence "as shall tend to connect the defendant with the commission of the offense.")

The only non-accomplice evidence remotely tending to connect Pickens to the commission of the crime was the testimony of Opal Fanning that on February 26 she saw petitioner and codefendant Senior at her apartment and that when codefendant Senior went out for a bottle, petitioner Pickens told her he was going to kick the - - - - out of Ackley, but:

"(H)e didn't say when he was going to do it . . ." (RT 50.)

Lena Galli testified for the State that on the afternoon of February 26, 1959, in front of a San Francisco union hall, two unidentified men forced a man who seemed to be quite drunk out of his car into theirs, and drove off, punching him. (RT 54.)

The prosecution then introduced the hearsay accusatory statement of codefendant Walter Senior, and rested. This oral statement inculpating petitioner was in the form of a tape recording, and was played to the jury to whom had been distributed typed transcripts thereof (People's Exhibit No. 14 for indentification) to read during the playing of the tape. (RT 131-174.) The complete text of this statement inculpating petitioner Pickens is set forth in RT page 132, line 11, through page 174, line 8. (In essence, it thoroughly corroborated the sordid testimony of the accomplice Mary Maribo and transfixed petitioner with guilt of the crime charged.)

(Petitioner Pickens at all times objected to the introduction of the statement of codefendant Senior, as set forth previously.)

In response to the use at his trial of the oral statement of codefendant Senior inculpating him, Pickens testified in his own defense. (RT 176-255.) His testimony was that the decedent Ackley was so drunk as hardly to be able to stand; that petitioner Pickens was equally drunk; that it was Mary Maribo, not he, who physically attacked and fought Ackley; that petitioner from time to time separated the two; but Mary Maribo continued her drunken attack on Ackley. Finally petitioner went to sleep, and that was the last time he saw Ackley, dead or alive.

Wanda Pickens, the wife of petitioner, testified for petitioner, corroborating his version of the matter. (RT 268-304.)

Codefendant Walter Senior did not testify.

ARGUMENT

(1) Where conviction is result of violation of due process, certiorari lies to require State Court to enforce habeas corpus. *Pennsylvania v. Claudy,* 350 U.S. 116, 100 L. ed. 126; *Palmer v. Ashe,* 342 U.S. 134, 96 L. ed. 154; *Uveges v. Pennsylvania,* 335 U.S. 437, 93 L. ed. 127.

(2) Trial use of a codefendant's confession inculpating petitioner is violation of due process right to confront witnesses. *Douglas v. Alabama,* 380 U.S. 415, 13 L. ed. (2d) 934; *Brookhart v. Janis,* 384 U.S. 1, 16 L. ed. (2d) 314; *Painter v. Texas,* 380 U.S. 400, 13 L. ed. (2d) 923.

(3) The statement of codefendant Senior was extremely prejudicial.

By reason of the accomplice corroboration rule in California (Section 1111, California Penal Code), and the absence of any strong non-accomplice evidence "tending to connect the defendant with the commission of the offense, Pickens could well have been acquitted, either by not testifying at all and arguing the extreme lack of non-accomplice testimony to the jury; or by testifying and pitting his credibility solely against that of Mary Maribo. But the Senior confession changed all that, and must of itself have strengthened the case against petitioner in the minds of jurors otherwise disposed to adhere to the California accomplice-corroboration rule.

(4) Petitioner made the appropriate objections during his trial and appeal.

It must be emphasized that the due process right in a criminal case to confrontation of witnesses is:

> ". . . in its primary and indispensable aspect . . . merely an application of the common-law rule against the admission of hearsay testimony, that is, testimony, the accuracy of which has not been subjected to the test of cross-examination . . ." *People v. Valdez,* 82 Cal.App.(2d) 744, 749; 5 Wigmore on Evidence (3d ed. 1940), §§1362, 1365, 1395-1397.

Thus Pickens from the very first, by his hearsay objections in the trial Court, duly and timely invoked the substance of the right to confront witnesses, federally guaranteed him by the Fourteenth Amendment.

RULE 19 STATEMENT

The special and important reasons for a review on writ of certiorari are:

(1) Although the United States Supreme Court has clearly established that trial use of hearsay statements against a non-declarant defendant constitutes denial of due process, it is not clear today whether such violation of due process can be cured by an instruction to the jury not to consider it against the non-declarant.

Della Paoli v. United States, 352 U.S. 232, 1 L. ed. (2d) 278, appears overruled by implication of the holding in *Jackson v. Denno,* 378 U.S. 368, 12 L. ed. (2d) 908.

> ("If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence." *People v. Aranda,* 62 Cal. (2d) 518, 528-529.)

Also, *Douglas v. Alabama,* 380 U.S. 415, 419-420, 13 L. ed. (2d) 934, 937-938, specifically held that a statement, not introduced for its truth as against the non-declarant defendant, nevertheless violates due process.

By reason of the foregoing, it appears that the state Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari to the Supreme Court of the State of California should be granted.

February 1, 1968.

Respectfully submitted,
GEORGE T. DAVIS,
Attorney for Petitioner.

(Appendices A, B and C Follow)

Appendix A

In the Supreme Court of the State of California

In Bank

Criminal No. 11,521

In re Pickens
On Habeas Corpus

Petition for writ of habeas corpus denied.

/s/ Traynor
Chief Justice

Mosk, J. did not participate.

Filed November 8, 1967
William I. Sullivan

Appendix B

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

United States Constitution, Fourteenth Amendment, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

28 U.S.C. 1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court, as follows: . . . (3) By writ of certiorari, . . . where any . . . right . . . is specially set up or claimed under the Constitution, . . . of . . . the United States." June 25, 1948, C. 646, 62 Stat. 929.

Section 1111 California Penal Code:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Article I, Section 5, California Constitution:

"The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension."

Article VI, Section 4, California Constitution:

"The Supreme Court . . . shall also have power to issue writs of . . . habeas corpus . . ."

Appendix C

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Crim. No. 3701

ERNEST C. PICKENS,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPINION

The appellant, Ernest C. Pickens, and Walter Senior were jointly charged by indictment with the murder of Charles Ackley on or about February 26, 1959. Both entered pleas of not guilty and were tried together before a jury which found the appellant guilty of first degree murder and Senior guilty of second degree murder. Senior was sentenced, and by stipulation of counsel, the jury was discharged and appellant's punishment fixed by the court at life imprisonment. Appellant's motion for a new trial was

denied and judgment entered. No appeal has been taken by Senior. On this appeal from the judgment and the order denying his motion for a new trial, the appellant argues that (1) the evidence does not support the verdict; (2) the trial court erred to his prejudice by allowing the district attorney to improperly impeach his own witness; (3) he was denied due process of law by the admission into evidence of an illegally obtained involuntary confession of the co-defendant, Senior.

The record reveals the following facts: On March 2, 1959, at about 8 a. m., the body of an individual in his middle sixties, weighing approximately 180 pounds, was found in a grove of trees across from the Sharp Park Golf Course. The autopsy was performed at 1:30 p. m. on March 3, 1959, and it was estimated that death had taken place from 30-48 hours earlier. The autopsy disclosed extensive trauma of the entire body. A 2-inch wide strip of the head had been shaved from the forehead to the back of the head. There were superficial abrasions and lacerations of the skin along the shaved strip and a slightly depressed abrasion about 1 inch in diameter on the right forehead. The eyes were swollen shut and discolored, evidencing hemorrhages; the nose was markedly distorted, showed a fracture of the nasal cartilage and was filled with dried blood. The upper lip had a cut through the entire lip and the lower lip showed a deep laceration. Both lips were covered with blood and covered with dirt—like material was on the tongue. There were numerous small bruises around

the neck and shoulders and on the back, chest, left abdomen and hip and areas of discoloration about 1 inch in diameter, representing similarly inflicted types of injury, as well as breaks in the skin over the left hip and left thigh and similar injuries to the buttocks.

The chest area showed a complete transverse fracture of the entire body of the sternum. As the sternum at the point of fracture is a little less than 1 inch thick, pressure in excess of 100 pounds is needed to cause a fracture. Such pressure may be caused by a kick from a horse, a body impinged on a steering wheel or by one person jumping on the chest of one lying prone. The rib cage was fractured on both sides and the lungs were both lacerated by fragments of the fractured ribs.

The coloration of the various bruises indicated that all were not inflicted at the same time, but it was clear that all of the injuries were inflicted before death. The county pathologist was of the opinion that the more recent bruises were inflicted 24 hours before death and the older bruises represented an additional 24 hours. The county pathologist also testified that this was the most severe infliction of injury by human intervention that he had ever seen and concluded that death had been caused by the numerous injuries described above, and that a person with such injuries would suffer severe pain and have great difficulty breathing and moving.

On March 12, 1959, a gunny sack containing blood-stained clothing, including a belt with the name

Charles Ackley on it, was found at Devil's Slide, south of the place where the body had been found. The body was identified as Charles Ackley.

On March 11, 1959, Mary Maribo was picked up and booked as a drunk by police officers of San Mateo County; she knew the victim, Charles Ackley, who also lived at the Vincent Hotel on Turk Street in San Francisco. On Wednesday, February 25, 1959, the appellant, Pickens, and Senior helped her move from the Vincent Hotel to a room on 16th Street. The appellant lent her the money to pay the rent on her new apartment. As she couldn't move her trunk and other large items to her new home, the appellant took them to his home on Lee Street in San Francisco.

The next day, Thursday, February 26, Mary saw Ackley about 11 a. m. on Valencia Street with one Staley; Ackley was drunk and staggering. Mary called the appellant's wife, Wanda, to see if they were going to bring her trunk and things. Mrs. Pickens then invited Mary to come out and help put up some curtains at the Pickens home. The appellant and Senior picked up Mary in their truck about noon and took her to the Pickens home; they then left for a short while to get some groceries. They returned about 1 p. m. with the groceries and 2 fifths of wine. Mary told Wanda that Ackley had said Wanda had been a prostitute before her marriage. Wanda repeated this to the appellant, and apparently gave him the impression that Ackley had said that the appellant had held Wanda while Ackley had intercourse with her. Mary then repeated what she had said and

told the appellant that Ackley had said other things about him in a bar. The appellant got very angry, called Ackley a dirty name, cursed, and threatened to make Ackley commit an indecent act with his dog. The appellant and Senior then left.

They returned to the Lee Street home about 5 p. m. with Ackley and brought him into the house. Ackley's teeth were out of his mouth and his lips were bleeding. The appellant pushed Ackley into a chair and asked him about the alleged statements. Ackley denied making the statements but the appellant said he knew Ackley had said them and slapped Ackley in the face. Ackley and the appellant slapped at each other until Senior entered and hit Ackley in the face. Ackley tried to defend himself but could not do very much against his two assailants. The two women left the room and could hear the sound of flesh hitting flesh.

When Mary returned to the living room a short while later, Ackley was naked and lying on the floor. The appellant told her to kick Ackley in the groin, which she did. Wanda and the appellant also kicked him. The two women again left the room; when they returned, they noticed that Ackley's head had been shaved from his forehead to the back of his head, and he was sitting in a chair and asking the appellant and Senior to stop.

The appellant went outside and came back with a large dog. Ackley said: "no, no, no," and the appellant said: "Oh, yes" and then pushed Ackley's head between the dog's legs. Mary again left the room.

When she returned, Ackley was lying on the floor with one eye closed and his entire face bloody and mashed up. The appellant and Senior were sitting on the davenport. As Ackley's blood was getting on the rug, they moved his head into the fireplace. There was blood on the floor from his nose, and feces on his body.

About 9 p.m., Mary and Senior left in a cab; the appellant told her she hadn't been out there and advised her to say she hadn't seen Ackley that day. The next day, February 27, Mary called the Pickens home and the appellant told her Ackley was all right. He repeated his warning of the night before, i.e., that she didn't know anything about it and had not been there. That evening, Senior told Mary that Ackley was in the basement of the Pickens home and that he had put some clothes on him and given him coffee, wine and a pill and that he had cleaned up the Pickens living room. The following day, Saturday, February 28, Mary again spoke to Senior, who told her that Pickens had said that Ackley had left. The next day, Sunday, March 1, Senior told Mary that he didn't know where Ackley was. On Monday, March 2, Mary read about the body found at Sharp Park. Senior came to her room and she said: "My Lord, that was, that was Ackley's body out there"; he said: "Yeah. Kid, the heat's on." He told Mary to stay in her room and not go out in the bars and promised to bring her all she wanted to drink in her room if she did not go out in the bars or streets.

On Saturday of the following week [March 7], the appellant came to Mary's room; Senior was there and

all three went to the Pickens home. The appellant again told her to remember that she knew nothing about this and had not been there. He also told her that the last time she had seen Ackley was when she saw him with Staley [on the morning of the 26th]. Later, Senior told her he had tried to get rid of Ackley's clothing. Mary identified the clothing found at Devil's Slide, as the clothing Ackley had when he was brought to the Pickens home on February 26.

Later, Mary went to a bar and was questioned by two officers. When she told Senior about this, he cursed, threatened and struck her. She called the appellant who told her that Senior would apologize, which he did.

Lena Galli testified that on the afternoon of February 26, she saw two men force a man out of a car, beat him, and put him in another car, at 16th and Valencia Streets. Opal Fanning testified that about 4 o'clock that same afternoon, the appellant and Senior visited her and the appellant told her they would really take care of Ackley; Senior told her: "Me and Ernie are going to find Chuck [Ackley] and if Ernie [the appellant] is going to do any killing, I'll help him."

The first argument on appeal is that the evidence does not support the verdict of first degree murder, but at most shows murder in the second degree, or voluntary manslaughter. Section 189 of the Penal Code so far as relevant defines murder in the first degree as "'[a]ll murder which is perpetrated by means of . . . *torture.*" [Emphasis supplied.] Murder by torture is characterized by the intent of the defend-

ant to inflict grievous pain and suffering upon his victim either for purpose of revenge, extortion, persuasion or to satisfy some sadistic impulse. (*People v. Daugherty,* 40 Cal.2d 876 [256 P.2d 911]; *People v. Misquez,* 152 Cal.App.2d 471, 480 [313 P.2d 206].) The fact of the victim's pain and suffering is not enough to establish murder by torture unless there is also evidence that the defendant possessed the intent to cause cruel suffering. (*People v. Caldwell,* 43 Cal. 2d 864 [279 P.2d 539].) Appellant argues that there is no evidence of his intent to cause cruel suffering. When a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is first degree murder. (*People v. Turville,* 51 Cal.2d 620 [335 P.2d 678].) We think the above summary of the evidence clearly indicates that the evidence is more than ample to sustain the verdict. It is not necessary to set forth the sordid events and appellant's participation therein in any greater detail. This is as clear a case of murder by torture as can be found in the annals of the law.

Appellant next argues that at the time of the offense, he was so intoxicated that he could not form the requisite intent, and that the jury was improperly instructed on the effect of his alleged intoxication. There is no merit in this argument. The appellant himself testified that he had been drinking heavily and was full of port wine, but knew what he was doing and what he said. He remembered that there was an incident with the dog; and also when Mary

and Senior left. His wife testified that although the appellant was drunk, he could stand, walk and talk. Mary testified that everyone was not intoxicated on the afternoon in question. Senior did not testify at the trial. The only other witness who supported appellant's theory of alleged intoxication was Opal Fanning. The jury was properly instructed in the language of section 22 of the Penal Code and *People v. Caldwell, supra. (People v. Gorshen,* 51 Cal.2d 716 [336 P.2d 492].) In view of the conflicting evidence, the jury's resolution of the effect of the alleged intoxication on the appellant's ability to form the requisite intent is conclusive on appeal. *(People v. Deloney,* 41 Cal.2d 832 [264 P.2d 532].)

Appellant next argues that he was provoked to "hot passion" against Ackley so that the offense could have been voluntary manslaughter and the trial court erred in failing to instruct the jury on voluntary manslaughter. We cannot agree. The only provocation occurred long before the victim was brought to the appellant's home on February 26. The trial court, therefore, properly concluded that the only kind of manslaughter applicable to the case was involuntary manslaughter and so instructed the jury.

Appellant also argues that the jury had to base its implied finding of premeditation on conjecture as they found Senior guilty of only second degree murder and there is no rational distinction between Senior's acts and the appellant's. In the light of the facts presented, it is obvious that the appellant was the chief instigator and perpetrator of the events which cul-

minated in the death of Ackley; nor is it in any way unusual or improper for a jury to find codefendants in a joint trial guilty of different offenses or different degrees of the same offense *(People v. Turville,* 51 Cal.2d 620, 638 [335 P.2d 678]; *People v. Blackwood,* 35 Cal.App.2d 728 [96 P.2d 982]).

The second major argument on appeal is that the trial court erred to the prejudice of the appellant, by allowing the district attorney to improperly impeach his own witness, James Fanning. James Fanning was called as a witness but could not remember the visit. He stated he was drunk all day. The district attorney then asked if Fanning remembered a conversation with certain police inspectors on March 12, 1959. Fanning replied that he did not remember as he was also drunk that day. Thereafter, the district attorney attempted to refresh Fanning's recollection with a statement made to the police inspectors. Fanning also could not remember making this statement. Mrs. Fanning then testified that on the afternoon of February 26, the appellant and Senior visited her at her home at 331 Valencia Street and told her of their intentions to take care of Ackley.

Appellant argues that this was improper impeachment, as the witness, James Fanning, only testified on direct examination that he did not remember any conversation with the appellant and the People's case was not "damaged." Appellant bases his argument on *People v. Newson,* 37 Cal.2d 34 [230 P.2d 618]. However, it is now clear that the Newson case did not lay down a rule that all negative answers are harmless,

and it is necessary to determine on the facts of each case whether the testimony of the witness sought to be impeached has actually damaged the party calling him. *(People v. LeBeau,* 39 Cal.2d 146 [245 P.2d 302].) We think that in the instant case, the prosecution suffered a loss of position when the witness Fanning stated that he could not remember the conversation *(People v. Spinosa,* 115 Cal.App.2d 659, 667 [252 P.2d 409]). To permit impeachment of one's own witness in this state, three elements must exist: (1) damage to the party calling the witness; (2) materiality of the evidence; and (3) surprise at his present testimony. *(People v. Spinosa, supra,* at 665; *People v. LeBeau, supra,* at 148.) When a witness testifies that he does not remember making his previous statements, it is competent to prove them for the purpose of impeachment. *(People v. Roach,* 148 Cal.App.2d 364, 370 [306 P.2d 523]; *People v. Bjornsen,* 79 Cal.App.2d 519, 535 [180 P.2d 443]; *People v. Gibson,* 154 Cal.App.2d 67, 72 [315 P.2d 442].) Here, the district attorney merely laid a foundation for impeachment. The actual impeachment occurred when the next witness, Mrs. Fanning, testified that the appellant was at her home on the afternoon in question and told her of their plans.

The final argument on appeal is that the appellant was denied due process because the court erroneously permitted the introduction into evidence of the alleged involuntary, illegally obtained confession of the codefendant Senior. The statement in question was on a tape recording, which was received into evidence;

a transcript of the tape was incorporated in the reporter's transcript by stipulation. When this evidence was originally offered, it was only against the declarant Senior and the district attorney stated that it would not be admissible against the appellant who was not present when the statement was taken. Appellant's counsel below objected on the ground that the statement was a self-serving declaration on behalf of Senior and contained no admissions against Senior's interest. Senior's counsel joined in the objection which was overruled by the trial court. The court then overruled appellant's counsel's objection to the passing of the tape to the jury, pursuant to *People v. Wojahn,* 169 Cal.App.2d 135 [337 P.2d 192], and before the tape was played, the jury was then instructed that the statement could only be considered in relation to the guilt of Senior and not in relation to the guilt of the appellant. A similar instruction was repeated during the later formal instructions to the jury.

Appellant now argues that this statement was not a confession or admission by Senior but a self-serving statement and an accusation against him, and seeks to bring himself within the rules of the coerced confession cases. There is no question that under the circumstances outlined above, evidence of a confession or admission by one of several codefendants is admissible under proper instructions limiting its consideration to the declarant, even though such evidence includes statements which tend to incriminate the codefendants. (*People v. Turville, supra; People v.*

Chavez, 50 Cal.2d 778 [329 P.2d 907]; *People v. Martinez,* 19 Cal.App.2d 599 [66 P.2d 161].) The few cases to the contrary presented very unusual circumstances: In *People v. Zammora,* 66 Cal.App.2d 166 [152 P.2d 180], there were 22 defendants; in *People v. Foote,* 48 Cal.2d 20 [306 P.2d 803], the statement lasted four hours, so that the court concluded that the statements were irrelevant and unnecessary and might confuse the jury under the circumstances.

In the instant case, the statement was wholly concerned with the circumstances surrounding the killing of Ackley and only corroborated Mary Maribo's testimony about Senior's participation therein.

The matter was also carefully considered by the trial court on the motion for a new trial, and it was pointed out that although appellant's counsel had a transcript of the statement before it was offered into evidence, he did not specify the specific portions he objected to in order to give the trial court an opportunity to correct any possible error *(People v. Lang Transportation Corp.,* 43 Cal.App.2d 134 [110 P.2d 464]), but simply objected to the entire statement.

As to the involuntariness of the statement, this matter was not raised below, but the only objection raised was that the statement was an accusation against the appellant. Thus, the question cannot be considered on appeal *(People v. Hurst,* 36 Cal.App.2d 63 [96 P.2d 1003]), unless there has been such a denial of due process of law that the entire conviction is void. *(People v. Millum,* 42 Cal.2d 524 [267 P.2d 1089].) We can find no such denial of due process here due

to the introduction of the statement, as the appellant asserts. We know of no authority where a denial of due process has been upheld under such circumstances. (See Maguire, Evidence of Guilt, Restrictions upon Its Discovery or Compulsory Disclosure, ch. 3, §§ 3.01-3.07, pp. 107-154.)

No prejudicial error appearing, the judgment of conviction and order denying the motion for a new trial are each affirmed.

Kaufman, P. J.

Draper, J., and Shoemaker, J., concurred.

Filed March 16, 1961,
Lawrence R. Elkington, Clerk.